No. 15146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT, LOUIS GLEN BALLARD.

THOMAS WHELAN,
411-12 Orpheum Theatre Bldg.,
San Diego 1, California,
Attorney for Appellant,
Louis Glen Ballard.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statute

No. 15146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT, LOUIS GLEN BALLARD.

ARGUMENT.

I.

Appellant Ballard Could Not Lawfully Be Indicted for nor Convicted of Violations of United States Code, Title 18, Section 545, nor of Conspiracy to Violate Said Section, on Allegations and Evidence Showing That the Objects, the Importation of Which Were Involved, Were Psittacine Birds.

Ballard refers to his opening brief—and adopts the following language from the Reply Brief of Appellant, Vic Buono:

"* * * When one smuggles psittacine birds, Congress intended he should be prosecuted under the laws re-

lating to psittacine birds. When he smuggles some other commodity, Congress intended he should be prosecuted under the laws relating to that commodity. Common sense makes it clear that Congress did not intend to make both a misdemeanor and felony of the single act of smuggling psittacine birds. It is furthermore clear that Congress did not intend that a psittacine bird smuggler could escape prosecution by presenting his birds at the border in compliance with 19 U. S. C. A., Section 1461, before smuggling them across the line. Yet such is the absurd result which follows from the reasoning of the Government.

"It does not appear necessary at this time to analyze the cases cited by the Government for the proposition that, when two statutes proscribe the same act, the United States Attorney may elect to prosecute under either. It is apparent from a reading of the decision of the Supreme Court of the United States in *Berra v. United States* (1956), 351 U. S. 131; 100 L. Ed. 1013, 76 S. Ct. 685, that two members of that Court believe that such a holding is contrary to the Constitution of the United States, and that the majority of the Court, feeling that the question had not been raised in the *Berra* case, expressly left it open (see p. 135). In these circumstances we respectfully submit that the duty devolves upon this Honorable Court to re-examine the above question in the light of the *Berra* decision, of the United States Constitution, Amendment V, and of the fundamental concept that ours is a government of laws and not of men."

II.

The Dignity of the United States Government Will Not Permit the Conviction of Any Person on Tainted Testimony.

Ballard points out in his opening brief that all of the witnesses called by the Government in its case in chief were either convicted of smuggling, conspiracy to smuggle or admitted such illegal participation, except for the witness Thomas E. Johnson. Johnson did not testify to any matter that would justify the verdict as to Counts IV, V or VI (Appellants' Br. p. 7).

The Government in its brief at page 3 admits this situation, but states:

> "There follows a résumé of the testimony adduced which it is established must be interpreted in a manner most favorable to the Government."

In *Mesarosh v. United States of America,* Vol. 77, Sup. Ct. Rep., page 1, *et seq.* (Oct. Term, 1956), where a Government witness who had testified against Petitioners and who had given what was deemed false testimony before a Senate Committee, the Supreme Court, speaking through the Chief Justice, said:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony" (p. 5); and
>
> "(6) Massei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a fedeal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not

polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

> " 'The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608; 87 L. Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.' Communist Party v. Subversive Activities Control Board, 351 U. S. 115, 124, 76 S. Ct. 663, 668.

"(7) The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial."

The evidence of Hadzima, Spicuzza, Todd, Curtis, Helm, and Ascani leaves no room for conjecture but that they expected favorable consideration from the Government as a result of their giving their testimony on behalf of the Government.

All of such witnesses who had testified in their own behalf on questions involved in this case admitted that in previous trials they had given testimony contrary to their testimony in the present case.

The conviction of Ballard in this case as to Counts IV, V and VI resulted from tainted testimony.

III.

The Motion of Appellant for a Bill of Particulars as to Counts IV, V and VI Should Have Been Granted.

The Government in its Brief (pp. 102 to 105), in reply to this contention, simply states that the granting of a Bill of Particulars is discretionary with the trial court and that the only reason that Ballard demanded a Bill of Particulars was to ascertain the Government's case, and that under the circumstances it was proper to refuse Ballard's demand for a Bill of Particulars.

From the Indictment which charges a conspiracy in Count IV, between April, 1953, and continuing to December, 1954, etc., how could Ballard have known that the Government would call Deputy Sheriff Johnson of San Diego County to show that Ballard was in February of 1953 in possession of a truck in San Diego County, which truck contained Parakeets; how could Ballard have known that the Government would introduce evidence from Hadzima that from July of 1953 until late in 1954 he (Hadzima) and Ballard engaged in the smuggling of psittacine birds, sharing the proceeds 45 per cent each and giving Appellant, Clifford L. Duke, Jr., 10 per cent thereof—*especially when the last overt act charged in Count IV was on a date in June of 1953.*

Further, this last mentioned evidence related to a separate conspiracy different from that charged in Count IV.

The Government refers to this last mentioned evidence in its brief, pages 9 and 10.

Ballard, prior to the time that the Government made its opening statement, objected to any statement of proof to

be adduced in support of Count IV of the indictment which occurred prior to the date of the conspiracy charged in Count IV of the indictment, and also that which occurred after the date of the last overt act charged in Count IV of the indictment [Tr. 48-52, and Appx. 134-138], citing *Fishwick v. United States,* 329 U. S. 211, 67 S. Ct. 224.

Proper objection was made by Ballard in each instance as the evidence was offered and by the Court overruled.

The Government in its brief (p. 103) cites cases in support of a rule of law, which Ballard concedes:

> "The proper function of a bill of particulars is two-fold, to state facts beyond those alleged in the indictment (1) so that the offense involved is sufficiently identified to enable the defendant to plead a conviction or acquittal thereon in bar of a possible second prosecution for the same offense; and (2) so that the defendant is sufficiently advised of the charge to enable him to prepare his defense and not to be surprised at the trial."

If the Government's theory as to Counts IV and VII in arguing its case against Buono is correct—that is, separate conspiracies because purpose of participants different and having different members in the alleged conspiracy —then can it be said that appellant Ballard could not as of this date be indicted and prosecuted for a separate conspiracy with Duke as his co-defendant and Hadzima as an unindicted co-conspirator, the conspiracy extending from July, 1953, to December, 1954, and the object of the conspiracy, the unlawful smuggling of psittacine birds between those dates, etc.

Therefore, Ballard was entitled to a Bill of Particulars not only to enable him to prepare his defense, but also to enable him to plead a former conviction or acquittal in bar of a possible prosecution for an independent and separate conspiracy.

By the Government's own testimony he was entitled to the Bill of Particulars he sought.

IV.

Appellant Made a Timely Motion for a Severance From His Co-defendants Which Was Denied, and Appellant Was Substantially Prejudiced and Deprived of a Fair Trial by Reason Thereof.

The Government replies to this claim and contention by stating that the matter of a severance is a question entirely within the Court's discretion, and to be reviewed only when there appears to be an abuse of that discretion.

The Government in its Brief (p. 108), cites *Opper v. United States* (1954), 348 U. S. 84 at 94, and emphasizes a quote from the decision as follows:

> "It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled * * *."

As the Government states the abstract principles of law appellant Ballard is in accord. In this case, however, *there is something in the record to indicate an abuse of discretion* when Ballard's motion for severance was overruled.

In the Government's Brief, pages 56 and 57, there is set forth a quotation from the appendix, pages 12 and 14

thereof, wherein Appellant Duke was quoted, from the record at the time of arraignment as saying that he had proof to show that certain individuals, including labor leaders and their attorneys, customs officers and members of the United States Attorney's office had entered into a conspiracy to obstruct justice by procuring false evidence to have him falsely indicted by the Grand Jury; that he wanted an early trial for the purpose of proving these matters.

These statements were made on June 3, 1955, in open court at the time of arraignment in Case No. 25276, the pending case and Case No. 25277 where Mr. Duke alone was a defendant (Appx. pp. 3-19).

After the making of these statements in open court before the Honorable Jacob Weinberger, Judge, everyone knew that there would be a dog fight, with the Government seeking to prove its charges and Appellant Duke seeking to prove that the charges were erroneously brought and by whom inspired.

Ballard filed his Notice of Motion to Move for a severance on June 15, 1955 (Appx. pp. 43-44). This motion for severance was heard and denied by the same Judge Weinberger, who had heard Mr. Duke's earlier statements (Appx. pp. 44 and 52-58).

To require Ballard to stand trial with Duke when it appeared, as it did, that the case would be tried in an atmosphere of prejudice and bitterness certainly indicated an abuse of discretion on the part of the judge who overruled the motion for severance; that the situation which developed should have been foreseen is borne out by the record, and appears affirmatively from the briefs of both Duke

and the Government. Throughout the trial there were discussions of what Judge Tolin referred to as Mr. Duke's special defense.

Every argument advanced by Duke tending to show that Duke did not receive a fair trial could be advanced by Ballard, as tending to prove that Ballard was prejudiced by being forced to trial with Appellant Duke. This is true, even as to the arguments that developed during the course of the trial over Duke's right to represent himself because of the difference of opinion that developed between Mr. Fitzgerald, who was attorney of record for Mr. Duke, and Mr. Duke and the discussion of the propriety of introducing certain evidence offered by Mr. Duke. Indeed, some of these discussions took place in the presence of the jury and resulted in the matter complained of by Ballard in his opening brief at pages 27-29. These matters were also discussed and referred to by the Government in its brief, pages 59-65. Appellant Ballard quotes from the Government's Brief, at page 64, as follows:

> "See also Tr. 4296-4297. From the foregoing it is clear that throughout the trial appellant Duke consistently adhered to, and acquiesced in, this theory of 'frame up,' 'conspiracy,' or if you will, his 'special defense.' At his instance, and with his tacit approval, the Court followed this theory and admitted evidence, otherwise inadmissible, for the purpose of proving that Duke was the victim of a frame up, or at least an attempt to convict him upon perjured evidence."

It is significant to note that the court, after one of these long discussions with Mr. Duke, as a practical proposition, tried to make Mr. Ballard take sides, either with Mr.

Duke or against him in connection with his special defense; that the colloquy set forth in Appellant's Opening Brief (pp. 27 and 28) resulted. It is also significant to note that in so far as Counts IV, V and VI are concerned, that the conversations wherein the so-called agreement to high-jack the birds smuggled by Spicuzza and Todd were claimed to have occurred, took place in Buono's office, at a time Buono was present, and participated in the conversations and alleged agreements, and although Duke was convicted on the charge contained in Counts IV, V and VI, Buono was acquitted as to these counts. In other words, the evidence would have as readily supported a conviction of Buono as to Counts IV, V and VI, as it would have supported a conviction against Duke. Because Ballard refused to take sides in the case and refused to disavow Duke's claimed special defense, it is Ballard's contention that the jury took sides against Ballard and found him guilty as to Counts IV, V and VI, but because Buono disavowed Duke's special defense, the jury spontaneously acquitted Buono.

The joint trial, plus the question put to Ballard by the Court, plus the many discussions and arguments concerning Duke's special defense which took place in the presence of the jury, the Court's ruling on the admissibility of evidence in support thereof, together with the Court's comments, the discussion of counsel pertaining to this special defense, plus the argument of the Assistant United States Attorney on Duke's special defense, make the refusal of the Court to grant Ballard a severance error so palpable as to need of no further argument.

In *Castellani v. United States,* 64 F. 2d 636, the defendant, a bank president, was charged jointly with two other

officers of the bank in one indictment, and jointly with one of such officers in another indictment. The two cases were ordered consolidated for trial, and the Court of Appeals held that the individual counts of each indictment must be regarded as separate counts of the consolidated indictment, and that each count constituted a separate and distinct offense, not all provable against the same defendants.

The appellant (Castellani) entered a plea of not guilty as to both indictments. His co-defendants entered a plea of guilty as to certain counts of the indictment in which all three were jointly charged and the co-defendants were used as witnesses for the Government. Appellant was convicted of one count of the second indictment, and acquitted of all other charges.

Citing *Pointer's* case, 151 U. S. 376, at page 403, 14 S. Ct. 410, 412, 38 L. Ed. 208, and *McElroy v. United States,* 164 U. S. 76, at page 80, 17 S. Ct. 31, at 32, 41 L. Ed. 355, and quoting from *McElroy* as follows:

> "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. * * *"

The Court of Appeals reversed Castellani's conviction and ordered a new trial.

In *United States v. Perlstein,* 120 F. 2d 276, where two attorneys and two bootleggers were jointly indicted in two counts each of which charged all four defendants with conspiracy: (1) To obstruct justice, etc., (2) to carry on a business of distillers without giving bond; where the unlawful distillers were convicted on each count, and the

appellants Perlstein and Paul found guilty on the first count only, the Court of Appeals reversed the conviction as to Perlstein because of evidence improperly introduced against him, and in reversing the conviction of Paul at page 283 says:

> "The extent of the prejudice to Paul which resulted from the joint trial cannot now be determined but became obvious in many rulings upon the evidence."

At the risk of belaboring the point that Ballard was entitled to a severance, we refer to the Government's Brief (pp. 2-11) where a statement of the case is set forth:

First the Government sets forth the claimed evidence with reference to Counts One, Two and Three of the indictment. It shows the witnesses Spicuzza, Todd and Hadzima engaged in the smuggling of psittacine birds on a commercial basis prior to 1952, and before any of the three had ever met Appellant Duke. It is claimed that Appellant Duke first met any of these men at a time in early 1953, when Duke defended a man named Vosburg. It is stated that witness Helm was in the early part of 1953 convicted of smuggling. It is stated that after Vosburg's acquittal there was a meeting in Duke's office between Hadzima, Spicuzza, Todd and Helm concerning the flying of psittacine birds into the United States from Mexico. The plan suggested was that Helm was to fly the birds in for the smugglers and real importers Hadzima, Spicuzza and Todd. Although Helm, Hadzima, Spicuzza and Todd had testified in trials in Federal Court in San Diego concerning the smuggling of psittacine birds (cases in which all but Helm were defendants) following the alleged meetings in early 1953 and before the return

of the indictment in this case, this is the first time that a contention was made that Appellant Duke was a party to any conspiracy.

However, now that the stage is set, the jury properly impressed *and inflamed,* we have what is called the high-jacking conspiracy the subject of Count IV, with related Counts V and VI. This came about because "Honest John" Hadzim thought Spicuzza was stealing from him, therefore he would steal from Spicuzza. The contention was and is that Hadzima planned to steal birds after they had been imported by Spicuzza and Todd. The contention is further made that he arranged with Appellant Ballard and one Purselley to steal birds from others in the United States.

Following the so-called high-jacking incident Counts VII, VIII, IX and X refer to what the Government contends is still another situation with Duke and Buono named as defendants. Ballard not named.

It is respectfully submitted that the consolidation of these charges prejudiced the rights of Ballard.

NOTE: Counts IV and I and VII all have different defendants, and the evidence to support Count I would not support a conviction as to Count IV. It is claimed by the Government that the evidence to support Count VII would not support a conviction as to Count IV, and vice versa.

It is of peculiar significance that the birds claimed to be the subject of the agreement in Count IV, and of the smuggling, possession, etc., of Counts IV and V, were actually smuggled by Spicuzza and Todd as the real par-

ties in interest, and yet neither Spicuzza nor Todd were named as unindicted co-conspirators in Count IV.

Counts IV, I and VII all have different unindicted co-conspirators, that is to say, not all unindicted co-conspirators named in one conspiracy are named in the others.

From the evidence set forth in the Government's Statement of Facts, it is apparent that Ballard was not guilty of conspiracy to smuggle birds (Count IV) or of the actual smuggling (Count V). True, he did nothing to prevent any smuggling, but did not initiate it and played no part in the actual planning to smuggle or the smuggling itself. Ballard, on the evidence, may have been guilty of a robbery, or conspiracy to rob, a kidnapping or of an assault with a deadly weapon or by means of force likely to produce great bodily harm—all violations of state law in California, but not of any Federal offense.

As Ballard points out in his Opening Brief (p. 9), "Whether appellant Ballard lived or died, or was unheard of, Spicuzza and Todd would have smuggled birds." They did smuggle the birds in question.

At page 9 of the Government's Brief, referring to the Desert Center affair the Government in its Statement of Facts recites:

> "After binding Spicuzza, Appellant Ballard hit him in the head, etc. Tr. 201, 203, 206, 587, 589" and "Ballard, Purselley and Hadzima then loaded the birds into a truck and returned to Burbank, California, where they transported the birds to an aviary belonging to Mary Ascani."

The Government perhaps stated those as facts in the interest of brevity.

Ballard has no transcript of the testimony but submits that the Transcript quoted by the Government [pp. 201, 203, 206, 583, 585 and 587 and accompanying pages] shows that Ballard occupied himself entirely with Spicuzza and Curtis while Hadzima and Purselley loaded the birds and drove away, leaving Ballard with Spicuzza and Curtis for several hours after Hadzima and Purselley left, and that Hadzima alone delivered the birds to Mary Ascani. Ballard never touched the birds and, unless by his conduct it can be said that he aided and abetted Hadzima and Purselley in a violation of the charge contained in Count VI of the indictment, he could not lawfully be convicted of that Count.

V.

Ballard Deprived of His Constitutional Right.

The Government in its brief argues that the contention of Ballard that he was prejudiced by the Court's intervention with the questions (see Op. Br. pp. 27-28) concerning Ballard's position, and that the conduct of the Court was in violation of the Fifth Amendment to the United States Constitution, was an allegation, and not explained.

A defendant in a criminal case in Federal Court need not urge anything, need not support nor disavow a contention urged by a co-defendant. This seems to be Hornbook law.

VI.

The Court Erred in One Material Instruction Prejudicial to Ballard.

The instruction complained of is set forth in Appellant's Opening Brief, pages 31 and 32.

It is difficult for a jury to forget when the Court gives instructions to tell the jury that it should scrutinize the testimony of a witness called to establish an alibi on behalf of a defendant. In effect, this characterizes such witness more or less as though the witness were an accomplice, whose testimony is by law required to be scrutinized carefully.

An abstract instruction as to the law pertaining to the defense of alibi cannot cure such an admonitory instruction, because the effect of such admonitory instruction is as much as to tell the jury that the testimony of the alibi witnesses is probably untrue.

> "The defendant has no burden of proof to sustain as to an alibi, if the proof in relation thereto raises a reasonable doubt as to his guilt, he is entitled to an acquittal."
>
> *Falgout v. United States,* 279 Fed. 513.

Conclusion.

For the reasons set forth herein, and in his Opening Brief, Appellant Ballard's convictions on Counts IV, V and VI were the result of error.

Appellant Ballard believes that the evidence was insufficient to justify his conviction, but that because of the prejudice he suffered by being required to stand trial with Appellant Duke, the trial court's action in inviting him to take the position as to whether he stood with Duke or against him with reference to the special defense, coupled with the evidence of claimed brutality on the part of Ballard at the Desert Center incident, resulted in his conviction.

Ballard respectfully submits that under the circumstances of the whole case it was impossible for him to have received a fair and impartial trial and because of the errors complained of he is entitled to a reversal.

Respectfully submitted,

THOMAS WHELAN,

Attorney for Appellant, Louis Glen Ballard.